FILED

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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

ROBERT A. LESLIE, Petitioner

v.

LONG BEACH CITY PROSECUTOR
LONG BEACH POLICE DEPARTMENT,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE TO THE UNITED STATES SUPREME COURT FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROBERT A. LESLIE
Consul for petitioner
In Propria Persona
243 Berkeley Avenue
Irvine, Calif. 92715.
714 8542246

QUESTIONS FOR REVIEW

1. Does a 28 U. S. C. §2254 action appealed to the U. S. Supreme Court, required as a necessary prerequisite to a §42 U. S. C. §1983 action, constitute a "formal" legal remedy designed to lessen the extent of (the claimants) injuries and damages in California's equitable tolling doctrine.

2. Is an error of law overlooked by the Federal Courts in a §2254 action dismissed without prejudice, regarding failure to obtain a speedy trial, and regarding illegal wiretaps, in conflict with the safe streets act of 1968, 18 USC, §2516-18, subsequently clarified by further U. S. Supreme Court decisions, reviewable in a §1983 action?

2. Are altered tape conversations, with inserted inculpatory remarks, and erased exculpatory remarks admitted

in evidence in a criminal prosecution, a violation of amendments VI, and XIV of the Federal Constitution?

3. Is the erasing of a tape recording containing exculpatory evidence, so that it cannot be played to the jury, a violation of the U.S. Supreme Court Decision of Brady vs Maryland?

4. Is fraudulent concealment of operatives original affidavits, in a criminal prosecution, in spite of the demand for their production on five occasions, before, during and after a trial, in violation of Brady v Maryland and Jencks vs the United States a violation of amendment VI and XIV of the Federal Constitution.

5. Does the fraudulent concealment of these operatives original affidavits by the city prosecutor and medical board until after prisoner's custody status had expired, a basis for habeus

corpus relief on the grounds of equitable estoppel in a §1983 action?

6. Does the fraudulent concealment and alteration of the Engrossed Statement on Appeal, by the trial judge, so that reversible errors cannot be considered by the appellate court, a denial of due process under Amendment XIV of the Federal constitution?

7. Is the legal doctrine of equitable estoppel applicable to this fraudulent concealment, permitting appellate review of such a conviction in either a habeus corpus petition or a §1983 action?

PARTIES TO THIS PROCEEDING

1. John R. Calhoun, City Attorney, 333 W Ocean Blvd., Long Beach, Ca. 90001.

5. Federal District Court, 600 Spring Street, Los Angeles Ca. 90802-4664.

6. United States Court of Appeals for The Ninth Circuit, P. O. Box 487,

San Francisco, Ca. 94101.

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JURISDICTION

The court has jurisdiction of this action under 42 U. S. C. §1983 and under 28 U. S. C. §1343, and 28 U. S. C. §2254. 2. The jurisdiction of this court is further invoked pursuant to 28 U. S. C. §1331, and 28 U. S. C. §1334, 28 U. S. C. §1337 and §28 U. S. C. 2401 (b) in which the Long Beach Police Department and the Long Beach City Prosecutor, and defense counsel acting under color of State Law Conspired to deprive Appellant of his civil rights by railroading him into jail for a crime he did not commit.

Petition is for a Writ of habeus corpus within the provisions of 28 USC §2254(b), a petition for of a Certificate of Probable cause being denied on January 13, 1992 by the Federal Court of Appeals, and a petition for reconsideration denied on February

10, 1992, summarily and without comment. "An application for a Writ of Habeus Corpus in behalf of a person in custody pursuant to a judgment in a State court shall not be granted unless it appears the applicant has exhausted the remedies available in the courts of that State." Prieser v Rodriguez, 411 US 475,497. This has been done in 10 petitions to The California State Supreme Court.

CONSTITUTIONAL PROVISIONS AND STATUTES

Federal Constitution Amendment IV. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated; and no warrants shall issue, but upon probable cause supported by oath or affirmation particularly describing the place to be searched, and the person or things to be seized.

Federal Constitution Amendment

VI In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been ascertained by law; and to be informed of the nature and the cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of consul for his defense.

Federal Constitution Amendment XIV Nor shall any state, deprive any person of life, liberty, or property without due process of law, nor to deny any person within its jurisdiction the equal protection of the laws.

FEDERAL STATUTES

18 USC §2515 Whenever any wire or

oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States, a state, or a political subdivision thereof if the disclosure of that information would be a violation of this chapter (18 USCS §§ 2510 et seq.) (1968).

18 USC 2518. (1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application.

18 USC §3500 All records of

government informants must be made available if defense consul requests them for impeachment purposes.

US SUPREME COURT DECISIONS

Brady v Maryland 373 US at 87. We now hold that suppression by The prosecution of evidence favorable to the accused upon request, violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or the bad faith of the prosecution.

Mooney v Holohan, 294 U. S. 103-112 It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of the court and the

preservation of testimony known to be perjured. Such a contrivance by the state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining a like result by intimidation.

Pyle v Kansas 317 US 213 215-216

confirms this opinion.

STATEMENT OF CASE

Plaintiff was arrested February 28, 1986 for improper prescribing practices for restricted drugs, extending from July 1985 through January 8, 1986. Trial was delayed until October 1, 1986, over objection of counsel, because the city prosecutor refused to release the medical charts of the operatives, because they amended the complaint, because a "principal witness" was in the hospital and could not testify, and because Detective

Hudson was on vacation.

When the trial was held, the "principal" witness did not testify. Defense counsel was denied inspection of the original affidavits of the operatives that testified in the trial, although he requested them in a pretrial motion, and in correspondence to the city prosecutor, and Judge Gibson Lee signed a discovery order demanding production of these documents. He was provided a falsified version of some of the original operatives findings, replete with errors, causing problems in cross examination. The city prosecutor also falsified some of the dates on the affidavits, and other affidavits, containing exculpatory evidence, was withheld from the jury and defense counsel, depriving him of an important defense of entrapment.

Defense was also denied permission

to audit the original tape recordings between petitioner and the operatives, admitted in evidence at the trial, although requested in a pretrial motion, and by correspondence to the city prosecutor. These recordings were altered by erasing exculpatory evidence and inserting false inculpatory evidence. The jury verdict was for conviction on eight counts.

The conviction was appealed, and defense counsel had to obtain relief from default. The court of appeal noted the appellate briefs were submitted without the Engrossed Statement on Appeal. Later, the Engrossed Statement on Appeal was forwarded to the appellate court after appellant had twice unsuccessfully searched the records for this document.

The Appellate Division of the Los Angeles Superior Court affirmed the

conviction, notwithstanding the fact they appeared to overlook many reversible errors appearing in the appellate briefs, June 1988. The reason for this was not apparent at the time, that the reversible errors were not considered because they were omitted from the Engrossed Statement on Appeal. Defense counsel's request for certification was denied because it was not filed timely, shortly before appellant's incarceration in jail July of 1988 for 42 days.

Defense counsel was sued for legal malpractice March 1989, and ten applications made for state then federal habeus corpus relief; then state and federal coram nobis, followed by an application for declarative relief, which denial is the basis of this appeal.

Petitioner was unable to submit an

adequate habeus corpus petition because defense counsel refused to release petitioner's criminal file, although sued for its return in his legal malpractice suit, until given an ultimatum to do so by the state bar, when appellant was no longer in custody. The original federal habeus corpus petition was not considered on its merits because of the absence of the necessary documentary evidence contained in the criminal file: The defense of inability to obtain a speedy trial was not considered because defense counsel perjured himself that trial delay was defense counsel strategy, and the petition had been summarily rejected before a reporter's transcript could be produced to verify the perjury. The defense of lack of probable cause and incompetency of defense counsel could not be supported without the

criminal file, and the magistrate judge was misinformed about the law regarding illegal wiretap evidence, which were objected to in the trial.

ILLEGAL WIRETAP

The tapes used in the trial were done by illegal wiretap, without a court order, in conflict with the safe streets act of 1968, 18 USC § 2516-18, which states: 1. A court order or permission from the attorney general must be obtained. 2. The penalty involved must be greater than one year in prison. 3. Maximum duration of wiretap 30 days; petitioners lasted six weeks. 4. Other investigation methods tried and failed. None of there requirements were met. This act superseded the state code provision cited earlier (Cal Penal Code 631,632,633) by the government attorney in the hearing and US Supreme Court

Decisions made since passage of that act, make it clear that court intends to enforce this law.

RECENT COURT DECISION-ILLEGAL WIRETAP

On November 12, 1992, the California State Supreme Court filed its opinion in re ROBERT PAUL WILSON on habeus corpus, SO27645, reversing the conviction, that numerous failings of his trial counsel deprived him of his constitutional right to the effective assistance of counsel, who failed to object to illegal wiretap evidence introduced at trial against petitioner in both appeals, which was also the case with petitioner.

On November 4, 1992 the United States Supreme Court did not intervene in the decision of the California State Supreme Court in the PEOPLE V. OTTO, 9 Cal Rptr.2d 596 (Cal. 1992) that unlawfully recorded telephone

conversations cannot be used in evidence in state criminal trials.

The safe streets act also states the recordings must be sealed in an envelope left in the judge's office, so that the city prosecutor will not tamper with the tapes as was the case here. Respondent's experience strongly indicates the wisdom of this law. Incidentally, the Administrative Law Judge, the honorable Mary Ellen Bittner, ruled that illegal wiretap evidence had been admitted in evidence against petitioner, January 1994.

When the magistrate was presented with documentary evidence from the released criminal file, and the reporter's transcript, he vacated his judgment of dismissal, and this vacation was overruled by the Honorable Judge Hill, presumably on the basis of the failure to exhaust. Mandemus was

unsuccessfully sought to the ninth circuit court, petition no. 91-65308. This dismissal was unsuccessfully appealed to the ninth circuit, 91-56039, and to the United States Supreme Court which declined to issue a certificate of probable cause, 91-1708.

A new Writ of Habeus corpus was immediately filed after receiving notice of rejection by the United States Supreme Court, which was summarily dismissed because petitioner was no longer in custody. This was followed by a Writ of coram nobis, rejected for the same reason, and an action for declarative relief dismissed as being untimely filed.

These files were searched a second time, March 1989, in connection with appellant's legal malpractice suit against defense counsel, SOC96683, and the original affidavits, and the

Engrossed Statement on Appeal were still missing.

DOCUMENTS PREVIOUSLY WITHHELD

In discovery in November 1993, preparatory to a hearing to restore plaintiff's narcotic registration, the government provided the original affidavits of the operatives from the medical board. This is in violation of Jencks vs the United States 353 US p 658: (f), since the city prosecutor, the judge, and the attorney general refused to produce these documents.

December 8, 1993, Federal Judge Bittner subpoenaed the trial tapes, and the original tape recorded interview of Marilyn Arreola, Detective Hudson, and Marcia Voisard. The tape recordings used in the trial were released by the court. The other tape recordings were not available having been erased

"for the convenience of the Long Beach Police Department." The Engrossed Statement turned up in the records of the Appellate Department of the Los Angeles Superior Court after these records were searched a third time.

These previously missing documents are the basis of plaintiffs Pleading for Estoppel of the Limitations defense, and the basis for this action for Declarative Relief.

Appellant had attempted to reverse his conviction with ten habeus corpus petitions filed in the State Supreme Court, and three Coram Nobis Petitions. In the State Courts relief was denied because they do not regard Habeus Corpus as a substitute for an appeal, and eventually because plaintiff was no longer in custody.

Plaintiff was unable to obtain Federal Habeus Corpus because defense counsel

refused to release plaintiff's criminal file, which provided the documentary evidence necessary to support the habeus corpus petition, while petitioner was still in custody, May 1991. A subsequent Federal habeus corpus petition was denied because appellant was no longer in custody. Petitioner was not eligible for Federal Coram Nobis Relief because he was a state prisoner, November 1993, so a declarative relief action was filed. The Federal District Court now states this action for declarative relief is time barred, and this decision is the basis for this appeal.

DECISION OF DISTRICT COURT

The motion for reconsideration and the motion for Summary Judgment (treated as a motion for reconsideration) are denied.

The matter is removed from the

calendar for 1/24/94, there being insufficient merit in the motion to allow oral argument.

No basis for reconsideration is shown. None of the tolling arguments advanced by plaintiff has validity and the limitations period has long since run. Dated January 21, 1994.

DECISION OF THE NINTH CIRCUIT COURT

On April 12, 1995 the ninth Circuit determined dismissal was in order because the ninth circuit court lacked the jurisdiction to reverse a state criminal conviction, Prisoner no longer qualifies for habeus corpus relief under §2254 because he is no longer in custody. Only the United States Supreme Court has authority to reverse a state criminal conviction. Pursuant to this the matter is referred to the United States Supreme Court.

REASONS FOR GRANTING

FRAUDULENT CONCEALMENT

Through fraudulent concealment on the part of the city prosecutor and the Medical Board, petitioner was denied most of the original affidavits of the operatives, although these were demanded in correspondence to the city prosecutor prior to the trial, in a discovery motion granted by judge Lee, and two petitions to compel discovery after the trial. These documents only surfaced December, 1993, in discovery in an action to restore petitioners narcotic registration. This fraudulent concealment was in violation of Brady v Maryland and Jencks vs the United States. It was a denial of the right of confrontation guaranteed in amendment VI of the Federal Constitution, and prevented effective assistance of counsel. Their absence prevented a fair trial or an effective appeal

because the original affidavits revealed 23 inconsistencies in the operative's testimony and several instances of outright perjury. The absence of the operatives original affidavits precluded effective habeus corpus review. Their absence also deprived petitioner of an important defense of entrapment. The typewritten summaries submitted by the prosecutor to defense counsel were replete with errors preventing effective cross examination, in violation of amendment VI of the constitution.

ENGROSSED STATEMENT ON APPEAL

Petitioner was not present in the hearing resulting in the Engrossed Statement on Appeal, or even told of its existence. He assumed that the document PROPOSED STATEMENT ON APPEAL would be submitted to the appellate court. (Appendix B15-19). The document

actually submitted by Judge Lee (Appendix B14-15) omitted eighteen reversible errors which were not addressed by the appellate court (Appendix B9-14) depriving petitioner appellate review of his conviction even though these errors were addressed in the appellate briefs. Habeus corpus review of these reversible errors was impossible because petitioners custody status expired before the state appeals were exhausted, and the fraudulent concealment of the supporting evidence by the medical board, defense counsel, and the city prosecutor.

§1983 STATUTE OF LIMITATIONS

All parties agree the decision of the US Supreme Court in The United States Supreme Court determined in Wilson v Garcia 471 US 261 that the one state statute of limitations most analogous to §1983 actions must be

applied to all §1983 actions adjudicated in the forum state: Board of Reagents v Tomanio 446 US 478. (1980); Chardon v Fumuro Soto, 462 US 650, 657.

The applicable statute in California is CCP §340 (3) which states in pertinent part: within one year (3) an action for injury. However, California Code of Civil Procedure Code §312, stating the action must be commenced within the prescribed period," after the cause of action shall have accrued." Where discovery is delayed in spite of plaintiff's exercise of reasonable diligence the cause of action has actually not accrued: Hobart v Hobart Estate Co. 26 Cal 2d 412, 436-44. In practice, the many exceptions emasculate the rule of §C.C.P. §340. See generally, O'Neal Accrual of Statutes of limitations: California Discovery

Exceptions Swallow the Rule, 68 California Law Review 106 (1980).e.g. Piazza Properties Ltd. v. Dept. of Motor Vehicles, 71 Cal. App. 3d 622; Priola v. Paulino 72 Cal App. 3d 380; Rubino v. Utah Canning Co. 123 Cal App 2d 18, etc.

EQUITABLE TOLLING

The US Supreme Court decision of Board of Reagents v Tomanio 446 US 478. (1980); Chardon v Fumuro Soto, 462 US 650, 657 determined state tolling provisions apply in a §1983 action. California's equitable tolling doctrine states the prior pursuit of a Federal Remedy may toll the state statute of limitations when a person "has several formal legal remedies and reasonably and in good faith pursues one." Jones v Tracy School distc., 27 Cal 3d 99,108; Elkins v Derby, 12 Cal.3d 410; Addison v State, 21 Cal.3d 313; Myers v Orange

County, 6 Cal App.3d 626, 635 (1970); Collyer v City of Pasadena, 142 Cal. App 3d 917,922-24. The statute of limitations is tolled during the period while time is consumed in an appeal.

Judge Hupp states in his original decision that a habeus corpus petition does not toll the running of the statute of limitations in a §1983 action. Petitioner believes that in the twenty six states that have an equitable tolling doctrine, which includes California, that this tolling doctrine should toll the statute of limitations in a 1983 action, since federal courts require exhaustion of state remedies as a prerequisite to filing a §1983 action. The only recorded case law on this point is in the fifth circuit: Fulford v Klein 529 F2d 377 required the filing of a separate §1983 action along with the habeus corpus. This

is not valid comparison because Louisiana does not have an equitable tolling law. Also, in this case, unlike the case at bar, defense counsel and the city prosecutor did not maliciously withhold evidence from the defendant.

A §1983 Action generally accrues when the plaintiff knows of the injury which is the basis of the action, in the ninth circuit, based on the discovery rule derived from the United States v Kubrick 444 US 111, and Basley vs. CMC Real Estate Corp, 923 F2d. 758.(1991). Equitable estoppel by fraudulent concealment provides that a defendant is estopped from exerting a statute of limitations defense if a defendants own misconduct prevented plaintiff from filing a suit in a timely manner applicable in the ninth circuit, as in California Law: Bell v Cooper 881 F2ds 257; Gomez v Great Lakes

Division National Steel Corp. 803 F2d 250.

DISMISSAL VIOLATES RULE 12

Defendant originally moved to dismiss on the pleadings, and has never filed any different motion. The order to dismiss is absolutely insupportable under rule 12. Under this rule, a defendant may make a motion to dismiss for failure to state a claim upon which relief may be granted Federal Rules of Civil Procedure 12 (b)(6). In addition, the rules provide that such a motion to dismiss shall be treated as one for summary judgment and disposed of as provided in rule 56. Additionally, all parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Federal Rule of civil Procedure 12 (b). A complaint should not be dismissed for insufficiency

unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. Ballon vs General Electric Co. 393 F2d 398.

Federal rule of Civil Procedure 12 (b)(6) is not applicable in this case, as plaintiff has clearly stated claims in the complaint upon which relief may be granted. Defendants motion to dismiss is based upon the theory that any cause of action is barred by limitations pursuant to California Code of Civil Procedure §340. The interpretation of the statute of limitations in this case, however, involve critical questions of material fact, which should be passed upon by the trial court.

Dismissal is precluded under Federal Rules of Civil Procedure rule 56.

Since the court was improperly attempting to resolve fact issues, it should have gone under rule 56, but the dismissal is insupportable under that rule also. Under the Albers vs County of Los Angeles 62 C.2d 250, 256; Lowe v. Copland 125 Cal App. 322; Consolidated Mtge. Co. v. Roberts 108 C.A.2d. 68; Goldstein v. McNeal 122 C. A.2d. 612; Sawyer v. City of San Diego 138 C. A. 2d. 662; Department of Mental Hygene v Lucas 243 C.A.2d 466. decisions it is sufficient for the plaintiff to allege facts, which if proved, would constitute an equitable estoppel. Once properly alleged, the issue of equitable estoppel is to be tested through the trial process, as pointed out by the above authorities.

EQUITABLE ESTOPPEL

A typical decision in Lowe v Copeland, 125 Cal App 322 states, "Unless but

one inference can be drawn from the evidence, waiver and estoppel are questions for the jury or the trial court (27 R. C. L.,Waiver p 912; Kerr v Reed, 187 Cal. 409; Parke v Franciscus, 194 Cal.284".

Regardless when the plaintiff discovered his injury the doctrine of estoppel precludes dismissal under the one year limitation statue of California Code of Civil Procedure §340. The issues of fraud and misrepresentation would be ultimately submitted to a jury, and if found valid would sustain the claim not only as to limitations, but on the merits as well.

The case at bar was dismissed for failure to prove the facts which would invoke equitable estoppel. The dismissal requiring proof is contrary to rule 56, and the above cited

authorities, cited in the first paragraph on page 35A of this brief.

Plaintiff has properly included fraud, fraudulent concealment and equitable estoppel in his pleadings. Since the elements of these causes of action have been properly alleged, the district court has no discretion in determining the doctrine of equitable estoppel should not apply. Under the equitable estoppel doctrine, the dismissal of this petition of declarative relief is inappropriate and plaintiff should be allowed to present his case for estoppel to the trial court.

As an issue of act exists regarding the date of discovery, dismissal is further precluded, The lower court erred as a matter of law in dismissing plaintiff's complaint.

The Supreme court had admonished

that "rule 56 should be cautiously invoked to the end that the parties may always be afforded a trial where there is a bona fide dispute of facts between them. Associated Press v. United States, 365 U. S. 1.(1945)

Plaintiff case does present genuine issues of material fact, particularly in regard to the discovery ruled on the statute of limitations. Since this issue presents itself so clearly, it is difficult to imagine a court would grant defendant's motion for summary judgment.

Carafas v LaVallee, 391 U.S. 234 (1968) citing Fiswick vs the United States, 329 US 211,222; see also Pennsylvania vs Mimms, 434 U.S. 106, 108 n.3 (1977) HELD: the possibility of a criminal defendant's suffering 'collateral legal consequences from a sentence already served permits him

to have his claims reviewed here."; Sibron v New York 392 U. S. 40, 50-58 (1968); McVeigh vs Smith 872 F2d 725,727. Barry vs. Brower, 864 F2d. 294,296; Landry vs. Hoepfner 840 F2d. 1201, 1204 Ginsburg v New York, 390 U.S. 629(1968); Walker vs McLain, 768 F2d. 1181-83; et. al. See Generally comment, The mootness question in habeus corpus proceedings where petitioner is released prior to final adjudication," 1969 Utah Law Review Rev. 265.

ACCESS TO COURTS

A third reason dismissal is improper is that it deprives plaintiff his right of access to the courts. The California State constitution states, No one shall be deprived of life, liberty or property without due process of law. The origins of this provision can be traced back to the magna carta. The US Supreme

court points out in Fay v Noia 372 US 391. " (a) The basis principle of the Great Writ of Habeus Corpus is that, in a civilized society, government must always be accountable to the judiciary for a man's imprisonment.

(b) A review of the history of habeus corpus shows that when the Suspension Clause, ART. I.§9, Cl.2 was written into the Federal Constitution and the first federal judiciary act was passed conferring habeus corpus on the federal judiciary, there was respectable common law authority for the proposition that habeus corpus was available to remedy any kind of restraint contrary to fundamental law.

(d) Conventional notions of finality in criminal litigation cannot be permitted to defeat a manifest federal policy that federal constitutional

rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review. pp 422-424.

(e) By relying on a rule of discretion, avowedly flexible and always yielding to "exceptional circumstances, this court has refused to concede jurisdictional significance to abortive state-court proceedings."

(b) Due process denied in state proceedings leading to a conviction is not restored because a state court declines to adjudicate on the merits the claim of such denial"

The dismissal is in violation of the equal protection clause in both the Federal and State Constitutions. Because petitioner was convicted of a lesser crime, causing his loss of custodial status, he is foreclosed from a hearing for habeus corpus,

whereas an individual convicted of more serious crime would remain in probation, preserving his right to habeus corpus, a common law right. Similarly it discriminates against the prisoner who is denied due process of law because the city prosecutor destroys exculpatory evidence in violation of Brady v Maryland 373 US 83 (a) preventing redress when this is discovered.

It also discriminates against the Federal vs the State prisoner, in which a prisoner convicted of a federal crime is given a hearing on a Federal Coram Nobis petition, but this right is denied a state prisoner convicted of the same crime. Petitioner presented this evidence to the highest state court in a coram nobis petition which was summarily denied.

In US vs Kubrick 444 US 111 (1979)

the court HELD: "That [a plaintiff] has been injured may in fact be unknown or unknowable until an injury manifests itself; and the facts about causation may be in the control of the putative defendant may be unavailable or at least difficult to obtain."

As the ninth circuit points out in Gibson vs the United States 781 F2d. 1334 (1986). 1336, Claim under the Federal Tort Claims Act accrued when plaintiff learned the truth, when revealed in the operatives original affidavits, discovered, November 1993, 28 USC §2401 (b). Since the Honorable Judge Gibson stated the materials were not available the basis of this declarative relief action was intentionally concealed from petitioner.

In the United States v Throckmortin 98 U. S. 61,65 (25L ED 93) HELD: relief will be granted in cases which, " reason

of something done by the successful party to the suit, there was in fact no adversary trial or decision on the issues of the case. When the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent."

The judgment of dismissal violates public policy by encouraging prosecutor to sustain convictions by concealing and destroying exculpatory evidence knowing that the prisoner's ability to obtain redress will be foreclosed by the custody requirement. As the United States Supreme Court points out," Mooney v Holohan, 294 U. S. 103-112": It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth

is but used as a means of depriving a defendant of liberty through a deliberate deception of the court and the preservation of testimony known to be perjured. Such a contrivance by the state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining a like result by intimidation."

The US supreme court considered the constitutional constraints applicable to limitations of action in Wilson v Iseminger 185 US 55. (1902) . . . It may be properly conceded that all statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; if it should attempt to do so, it would

not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions. It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action.

Section C.C.P. §340, in this case, does not provide a reasonable time for the commencement of an action which occurred three years after petitioner's custody status expired, And six years after the conviction in 1886. Thus this statute is unconstitutional because it bars an action six years before the cause of action had arisen.

This dismissal is contrary to public policy because it encourages city prosecutors to have operatives to give perjured testimony, and false evidence, and to withhold exculpatory evidence

on the basis the one year limitations in a §1983 action knowing timely discovery of the truth to be unlikely.

CONCLUSION

Petitioner was convicted in California State Court in September, 1986 for prescribing controlled substances without medical need and criminal excessive prescribing. After his conviction, petitioner filed several habeus corpus petitions with the California Supreme Court seeking reversal of his conviction. Apparently, all of these petitions were dismissed for failure to exhaust his appeals and eventually because petitioner was no longer in custody.

Petitioner then sought federal habeus relief, but his petition was denied because he was no longer in custody. Finally, petitioner sought relief by writ of Coram Nobis to the California

Supreme Court and the federal district court. Both writs were denied.

On November 8, 1993, petitioner filed this 42 U.S.C. §1983 action in the federal district court for the central district of California, stating the City Prosecutor for Long Beach and the Long Beach Police Department ("defendants") deprived him of his liberty and property by procuring a criminal conviction against him by illegal means. Specifically; (1) there was no probable cause for his arrest; (2) false evidence was used at his trial; (3) the prosecution destroyed exculpatory evidence; (4) several witnesses perjured themselves; and (5) illegal wiretap evidence was introduced at this trial; (6) the prosecutor tampered with the recordings used in the trial.

On November 22, 1993, defendants

moved to dismiss petitioner's complaint under Fed. R. Civ. P. 12(b) (6). Defendants alleged that he was attempting to relitigate his conviction and, in the alternative, that his §1983 action is barred by the statute of limitations. In opposition, petitioner argued that the limitation period of the statute was tolled by his filing of habeus petitions or as a result of defendant's fraudulent concealment. In the alternative, petitioner argued that the action did not accrue until November, 1993.

On December 20, 1993, the district court dismissed petitioner's complaint as barred by the statue of limitations. On December 28, 1993 petitioner moved for reconsideration asserting the district court made erroneous legal conclusions.

On January 26, 1994, petitioner filed

a timely appeal from the district court's dismissal. The ninth circuit court dismissed the complaint on the ground that Federal district courts, as courts of original jurisdiction, have no authority to review the final judgments of state courts. District of Columbia Court of Appeals v. Feldman 460 U.S. 462, 482 (1983); World Wide Church of God v. McNair, 805 F.2d 888, 890 (9th Cir. 1986). Rather, the United States Supreme Court is the appropriate forum in which to obtain such a review.

Petitioner is referring this matter to this court pursuant to this decision.

PRAYER

Plaintiff requests this court grant certioriari to this petition or reverse the state criminal court conviction, or refer this matter to the district court for a trial on the merits.

Respectfully Submitted,

Robert A. Leslie

Robert A. Leslie

In Pro Per:

VERIFICATION

I, Robert A. Leslie, am the petitioner and have prepared this Opening Brief. The information contained there is true of my own Knowledge. I declare under penalty of perjury the foregoing is correct.

Executed in Irvine, California April 24, 1994.

Robert A. Leslie

Robert A. Leslie

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT APRIL 17, 1995 JUDGES CHOY, SKOPIL, AND FERGUSON, CASE NO. 94-55201, D.C. No. CV-93-06750-DT(JR: Petition for a rehearing was denied.

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT MARCH 30, 1995 JUDGES CHOY, SKOPIL, AND FERGUSON, CASE NO. 94-55201, D.C. No. CV-93-06750-DT(JR: Robert Leslie ("Leslie"), a former state prisoner, appeals pro se the district court's dismissal of his 42 U.S.C. § 1983 civil rights action seeking reversal of his state court conviction. Leslie contends that the district court erred by concluding that his claim was time barred.

I

Leslie was convicted in California State Court in September, 1986 for

prescribing controlled substances without medical need and criminal excessive prescribing. After his conviction, Leslie filed several habeus corpus petitions with the California Supreme Court seeking reversal of his conviction. Apparently all of these petitions were dismissed for failure to exhaust his appeals and eventually because Leslie was no longer in custody. Leslie then sought federal habeus relief, but his petition was denied because he was no longer in custody. Finally, Leslie sought relief by writ of Coram Nobis to the California Supreme Court and the federal district court. Both writs were denied.

On November 8, 1993, Leslie filed this 42 U.S.C. §1983 action in the federal district court for the central district of California. Leslie alleged that the City Prosecutor for Long Beach

and the Long Beach Police Department ("defendants") deprived him of his liberty and property by procuring a criminal conviction against him by illegal means. Specifically Leslie alleged that: (1) there was no probable cause for his arrest; (2) false evidence was used at his trial; (3) the prosecution destroyed exculpatory evidence; (4) several witnesses perjured themselves; and (5) illegal wiretap evidence was introduced at this trial.

On November 22, 1993, defendants moved to dismiss Leslie's complaint under Fed. R. Civ. P. 12(b) (6). Defendants alleged that Leslie was attempting to relitigate his conviction and, in the alternative, that his §1983 action is barred by the statute of limitations. In opposition, Leslie argued that the limitation period of the statute was tolled by his filing

of habeus petitions or as a result of defendant's fraudulent concealment. In the alternative, Leslie argued that the action did not accrue until November, 1993.

On December 20, 1993, the district court dismissed Leslie's complaint as barred by the statue of limitations. On December 28, 1993 Leslie moved for reconsideration asserting the district court made erroneous legal conclusions. On January 26, 1994, Leslie filed a timely appeal from the district court's dismissal. We have jurisdiction pursuant to 28 U. S. C. §1291.

II

We agree with the district court's dismissal of Leslie's complaint, but disagree with the basis of the district court's decision. The district court should have dismissed for lack of subject-matter jurisdiction. We are

obliged to raise issues concerning subject-matter jurisdiction sua sponte, Benavidez v. Eu, 34 F.3d 825, 830 (9th Cir. 1994), and we review de novo the existence of the subject-matter jurisdiction in the district court, Allah v. Superior Court, 871 F.2d 887, 890 (9th Cir. 1989).

Federal district courts, as courts of original jurisdiction, have no authority to review the final judgments of state courts. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983); World Wide Church of God v. McNair, 805 F.2d 888, 890 (9th Cir. 1986). Rather, the United States Supreme Court is the appropriate forum in which to obtain such a review. Worldwide Church of God, 805 F.2d at 890. "This doctrine applies even when the challenge to the state court decision involves federal constitutional

issues." Id. at 891.

Federal courts may assert subject-matter jurisdiction under the federal habeus corpus statute, 28 U.S.C. §2254, in order to entertain habeus corpus petitions from individuals who are in custody pursuant to a state court judgment. Dreman v. Francis, 828 F.2d 6,7, (9th Circuit 1987). A pro se §1983 complaint challenging the fact or duration of a conviction may be construed as a habeus petition under certain circumstances. See Trimble v City of Santa Rosa, No. 94-15567, slip op. 2645, 2651 (9th cir. March 9, 1995; Franklin v Oregon, 662 F.2d 1337, 1347 n.13 (9th circ. 1981). However if the complainant is no longer in custody, it is inappropriate to construe the claim as a habeus petition. See Sperl v Deukmajian, 642 F.2d 1154, 1155 (9th circ. 1981). "Once the

sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render an individual 'in custody' for the purposes of a habeus attack upon it." Brock v Weston, 31 F.3d 887, 889 (9th circ. 1994)(quoting Maleng v Cook, 490 U.S. 488, 492 (1989)).

Leslie brought a §1983 claim essentially seeking a declaratory judgment reversing his state criminal court conviction. Leslie claims the defendants deprived him of his liberty and property by procuring a criminal complaint against him by illegal means. The district court cannot evaluate such a claim without conducting a review of the state court's judgment. See Worldwide Church of God, 805 F.2d at 892-93. Because Leslie's §1983 claim is tantamount to asking the district

court to exercise appellate review over the state court's decision, the district court lacks subject-matter jurisdiction. Id.; see Sperl, 642 F.2d at 1154 ("Declaratory relief is not available in federal court to attack a state criminal conviction."). Furthermore, because Leslie is no longer in criminal custody, his claim cannot be construed as a habeus petition which could overcome this jurisdictional bar. See id. at 1155.

III

We vacate the district court's dismissal on the statute of limitation ground and remand with instructions to dismiss for lack of subject matter jurisdiction. **Vacated and Remanded.**

DECISION OF THE FEDERAL DISTRICT COURT HONORABLE HARRY HUPP JUDGE, JANUARY 24, 1995; The motion for reconsideration and the motion for Summary Judgment

(treated as a motion for reconsideration) are denied. The matter is removed from the calendar for 1/24/94, there being insufficient merit in the motion to allow oral argument.

No basis for reconsideration is shown. None of the tolling arguments advanced by plaintiff has validity and the limitations period has long since run. Dated January 21, 1994.

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent vs. Robert Andrew Leslie, defendant and Appellant, Superior Court No. CRA25087 Long Beach Municipal Court No. M22-45-65 MEMORANDUM JUDGMENT Filed May 18,1988. JUDGES MARGOLIS AND WOODS:

Judgment is ordered as follows: The judgment is affirmed. Defendant first complains the evidence is insufficient to support his conviction of violating Health and Safety Code sections 11154

and 11156 and Business and Safety Code 725. We Cannot agree.

Health and safety code section 11154 prohibits a doctor from prescribing a controlled substance to any person who is not under the physician's treatment for a pathology or condition. Here Shiela Cassidy (also known as Cassidy or Shiela Stein) testified she met with defendant five times, and although she indicated to defendant she had no medical problems and simply wanted prescriptions for controlled substances, defendant, without so much as a cursory examination of Cassidy wrote her numerous prescriptions for controlled substances. Such testimony was sufficient for the jury to find that the defendant violated Health and Safety Code section 11154. People v Johnson (1980) 26 Cal 3d 557, 562. See People vs Braddock (1953) 41Cal

2d 794,801.

Health and Safety Code Section 11156 States: "No person shall prescribe . . . a controlled substance to an addict or habitual user, or to any person who represents himself as such . . ."

Here, defendant was cited for violating this code on five different occasions with three different witnesses. Again, our review of the testimony presented at trial reveals sufficient evidence for the jury to find that defendant prescribed controlled substances, who represented themselves as habitual users of the drugs to defendant. For example, On October 18, 1945, Witness Marcella Voisard asked defendant for a prescription for valium because," she liked taking it." She received not

only a prescription for valium, but also another drug. On October 31, 1985, witness Voisard again visited defendant at his office and after announcing she was "there for a refill" received prescriptions for three controlled substances.

On October 31, witness Cassady visited defendant at his office. When defendant asked her why she was there, the witness responded she had no problem, but that she "liked getting high." He responded by giving her prescriptions for controlled substances on that date and on November 21, 1985 and January 7,1986. On July 17, 1986, witness Rochelle McCullough sought from defendant a prescription for the drug doriden because she liked taking it "instead of drinking alcohol. Again, based on these witnesses' testimony, we find sufficient evidence supports

defendant's conviction for violating Health and Safety Code section 11156. People v Barnes (1986) 42 Cal.3d 284, 303.[1]

Business and Professions Code Section 725 prohibits a physician from excessively prescribing drugs. Testimony established that in a two week period, he gave Voisard five controlled substances. People vs Johnson 26 Cal 3d at 562.

Defendant next complains that audio tapes of conversations were not authenticated. However, our review of the record reveals that Officer, Gary Hudson, testified he monitored the conversations as they occurred and testified that the cassette copy of the conversations which was introduced at trial accurately reflected the conversations. Such was sufficient to authenticate the cassette copy.

Finally, we conclude that the jury

was properly instructed as to the defense of entrapment. (See People v Slatton (1985) 137 Cal.App.3d 487, 491.

ENGROSSED SETTLED STATEMENT ON APPEAL SUBMITTED BY JUDGE GIBSON LEE DECEMBER 1, 1987: The two complete reporter's transcripts (Volume I and II) which were ordered by the Long Beach City Prosecutor's Office, of the jury trial proceedings held before the Honorable Gibson Lee of the Long Beach Municipal Court, as reported by Lori White, certified shorthand reporter, dated September 29, 1986, through October 6, 1986 are hereby incorporated as the record on appeal. GROUNDS ON APPEAL

1. Insufficiency of the evidence.
2. Prejudicial error occurring at trial.
3. Entrapment. I certify that the foregoing narrative statement on appeal is true and correct as engrossed and

is hereby made a part of the record on appeal. Signed Gibson Lee Judge of the Municipal Court, 11-25-87

PROPOSED STATEMENT ON APPEAL FILED BY DON EDWIN RANEY OCTOBER 13, 1987:

The defendant and appellant, Robert Andrew Leslie by and through his attorney of record, don Edwin Raney hereby submits proposed statement on appeal and further gives notice that he intends to file a reporter's transcript of the evidence and proceedings in this case covering the grounds of his appeal and does hereby make the transcript a part of this statement.

The grounds and substantial evidence on which the defendant and appellant intends to rely on appeal are as follows: 1. Insufficiency of the evidence. (a) Two of the three undercover operators called by the

prosecution testified on cross examination that they were not addicts or habitual users of restrictive drugs and did not represent themselves to the defendant doctor as such. The third represented herself as a chronic alcoholic and none of the undercover operators claimed to have been on medication for any period of time, and none of them met the medical definition of an addict or habitual user.

(b) Undercover operators charts showed that they were under treatment by the defendant doctor for a pathology or condition, and the doctor took histories, gave physical examinations, obtained a diagnosis and performed treatments in the matter of the medications.

(c) All undercover operators stated false medical conditions which was

a violation of their instructions from the Board of Medical Quality Assurance and was an obvious inducement for the doctor to treat these supposed medical conditions.

(d) Some of the medications charged were issued by the weight control section of the clinic and not by DR. Leslie.

(e) The prosecutor's only professional witness merely stated he did not agree with the defendant doctor's prescriptions, but at the same time admitted he could not read the doctor's charts and so he did not know what condition the doctor was prescribing for.

Prejudicial Error Occurring at Trial

(a) In closing argument the prosecutor stated regarding the pharmaceuticals prescribed by the defendant, "speed" thats what it is and charged the doctor

with "making a profit." In this regard speed is a schedule II street drug and only schedule III drugs were stipulated to be used at trial. In addition, the defendant doctor was salaried and made no possible profit was shown by the evidence which would lead the jury to believe that the doctor was regularly engaged in the sale of street drugs on which he was making substantial profits.

(b) No standard for prescribing a controlled substance was given by the prosecution for the guidance of the jurors.

(c) The originals of the tape of a telephone call and one of the wired operators were admittedly destroyed for "convenience" of the police department and were admitted into evidence over the objection of counsel.

3. Entrapment.

(a) The prosecutions undercover operators admitted being sent out to "work" the doctor and went to great lengths to influence the doctor when he refused medication or hesitated to prescribe it. From the evidence the intent to violate the Health and Safety Code and the Business and Professions Code was that of the undercover operators and not the defendant doctor.